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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIE A. ANDERSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

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FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

Defendant's brief raises the following issues:

1. Did the trial court commit prejudicial error in not conducting a hearing outside the presence of the jury to determine whether the in-court identification of defendant and co-defendant by witnesses Paley, Branning and Hernandez were tainted by the pretrial viewing of photographs depicting defendant and co-defendant in the absence of defendant's counsel?
2. Was the manner of exhibiting the photographs of defendant and co-defendant to witnesses Paley and Hernandez so

defective so as to deprive the defendant of due process of law?

II

STATEMENT OF FACTS

WILLIE A. ANDERSON and a co-defendant were indicted on May 3, 1967, for violations of Title 18, United States Code, Section 371 (conspiracy to defraud the United States) and Section 472 (uttering counterfeit obligations) [R. T. 9-13]. ^{1/} The eight count Indictment charged ANDERSON and a co-defendant with one count (Count One) of conspiring to pass counterfeit \$10.00 Federal Reserve Notes and five counts (Counts Two through Six) of passing counterfeit \$10.00 Federal Reserve Notes.

ANDERSON was arraigned and entered a plea of not guilty to all counts on May 15, 1968. Prior to trial, the Government dismissed Count Two of the Indictment and at the conclusion of the Government's case, the Court ordered, as to Count One, a judgment of acquittal [R. T. 14-15, 165]. Trial by jury commenced on August 1, 1968, before the Honorable Warren J. Ferguson, United States District Judge [R. T. 4]. A verdict of guilty on Counts Three and Six was returned on August 2, 1968 [R. T. 243]. On September 15, 1967, ANDERSON was sentenced to the custody of the Attorney General for a period of five years [R. T. 264].

^{1/} "R. T. " refers to Reporter's Transcript.

III

ARGUMENT

A. DEFENDANT CANNOT RAISE ON APPEAL
A POINT NOT URGED IN THE TRIAL
COURT.

Defendant ANDERSON contends that he was entitled to have had the trial judge conduct a hearing outside the presence of the jury to determine whether the in-court identifications by witnesses Paley, Branning and Hernandez were tainted by a pretrial photographic display.

Defendant was represented by competent counsel at trial. No testimony was offered at trial which in any way showed that the pretrial photographic display was unnecessarily suggestive, and no issue was raised by defendant during trial that this procedure was conducted in a prejudicial manner. Having failed to raise this issue in the trial court, defendant should not be allowed to raise it for the first time in this Court. See United States v. Ladson, 294 F.2d 535, 538 (2nd Cir. 1961), cert. denied 369 U.S. 824 (1962); Rugendorf v. United States, 376 U.S. 528 (1963), reh. denied 377 U.S. 940 (1964); Williams v. United States, 358 F.2d 325 (9th Cir. 1966).

B. THE RIGHT TO COUNSEL AT PRETRIAL
LINEUPS DOES NOT EXTEND TO PRE-
TRIAL PHOTOGRAPH IDENTIFICATION.

Defendant's contention that he was entitled to have his counsel present at a pretrial photographic display is based upon extension of the rule established in United States v. Wade, 388 U.S. 218, wherein the Court held that the accused is entitled to counsel at all critical stages of the criminal prosecution and that a pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution. The Court, however, in the Wade case, clearly distinguished pretrial lineups from other stages in the criminal prosecution of a less critical nature, ". . . such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like". See Wade, supra, at p. 227. The Court explained this distinction as follows:

"We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the

presentation of the evidence of his own experts.

The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." Wade, supra, at pp. 227-228.

This distinction was applied in United States v. Miller, ____ F. Supp. ____ (D.C. E.D. Penn. 1968) (No. 22960, Sept. 3, 1968), wherein the Court held that pretrial photographic displays are not a critical stage in the criminal prosecution and therefore the accused is not entitled to have his counsel present when such displays are conducted. The Court reasoned in the Miller case that any form of unfair suggestion or other prejudice at this procedure " . . . arises from the nature and/or type of photographs displayed. By using these photographs in his cross-examination of Government witnesses, defense counsel easily can reveal such prejudice and thereby impugn the related identification testimony". See Miller, supra, at p. 3256.

C. THE MANNER IN WHICH THE PRE-TRIAL PHOTOGRAPHIC DISPLAY WAS CONDUCTED DID NOT DENY APPELLANT DUE PROCESS OF LAW.

Defendant contends that Special Agent Tomsic displayed

photographs, including his photograph, to witnesses Paley, Branning and Hernandez in an unnecessarily suggestive manner. Defendant further argues that this procedure was conducive to irreparable mistaken identification and therefore all identification testimony at trial of these witnesses who viewed the photographs should have been suppressed.

The question of whether defendant's photographic identification constituted a denial of his right to due process of law depends on the circumstances surrounding the photographic display. Stovall v. Denno, 388 U.S. 293 (1968). As stated in Simmons v. United States, 390 U.S. 377 (1968) at page 384:

" . . . we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in Stovall v. Denno, 388 U.S. 293, 301-302, and with decisions of other courts on the question of identification by photograph. "

See also People v. Evans, 39 Cal.2d 242,

246 P.2d 636.

The evidence in this case discloses that witnesses Paley, Branning and Hernandez were shown between eight and ten photographs at a pretrial photographic display a week before defendant's trial began [R. T. 64-69, 88-90, 115-119]. Of these, approximately three were of defendant and three were of co-defendant Miller. It is not clear from the record whether the remaining photographs were of defendant, co-defendant Miller, or a third party. Defendant's counsel was given ample opportunity to cross-examine these witnesses and impugn their testimony. There is no evidence in the record that this photographic identification procedure was conducted in a prejudicial manner. As the courts so often state:

"We do not presume errors; we require the appellant to demonstrate it."

Sica v. United States, 325 F.2d 831 (9th Cir. 1963),
at 836, cert. denied 375 U.S. 952.

The Government respectfully submits that this pretrial photographic display was not conducted improperly.

CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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